

**FILED**

**JUN 16 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ADRIAN STEPHEN BURKE,

Defendant - Appellant.

No. 04-10529

D.C. No. CR-03-00443-KJD

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Nevada  
Kent J. Dawson, District Judge, Presiding

Submitted June 12, 2006<sup>\*\*</sup>

Before: FERNANDEZ, KLEINFELD and BERZON, Circuit Judges.

Adrian Stephen Burke appeals from his 77-month sentence imposed following a guilty-plea conviction for Unlawful Reentry of a Deported Alien, in

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we remand.

Burke contends that the district court erred by basing a 16-level enhancement, pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(i), on a Nevada judgment that contained two convictions, only one of which qualifies as a drug trafficking offense. Burke contends the judgment was ambiguous and thus, the enhancement was improper. We disagree. The Nevada state court judgment unambiguously reflects that Burke was convicted of possession of a controlled substance with intent to sell, in violation of Nev. Rev. Stat. 453.337. Based on this conviction, the district court properly imposed the 16-level enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(i). *See United States v. Benitez-Perez*, 367 F.3d 1200, 1204 (9th Cir. 2004) (“Because [Nev. Rev. Stat. § 453.337] does not reach conduct outside of a drug trafficking offense under § 2L1.2, *Taylor’s* categorical analysis is satisfied and the 16 level enhancement was properly applied.”).

However, because Burke was sentenced under the then-mandatory guidelines, we remand for further proceedings consistent with *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005).

**REMANDED.**